

## First Supplement to Memorandum 2000-12

### Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

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We have received the letter attached as Exhibit pp. 1-4 from Michael Nave addressing issues raised in Memorandum 2000-12. In this connection, we should also consider a suggestion made by Norm Matteoni in his letter attached to the First Supplement to Memorandum 2000-11 (litigation expenses in eminent domain cases).

#### EARLY DISCLOSURE OF VALUATION DATA

In Memorandum 2000-12, the staff examines the Los Angeles County rules for early disclosure of valuation data and recommends against extension of those rules to the rest of the state. The staff's reasoning is that (1) available statistics do not indicate a significant difference between the rate of settlement in Los Angeles versus the rest of the state, and (2) legislation effective January 1, 2000, pushes the exchange date back to 60 days before trial, and we have no experience yet under this regime.

Mr. Nave argues that 60 days is better than the old 40 day rule, but is still not enough time; he thinks the 60 day period needs to be doubled. "It is my opinion, based on three decades of eminent domain practice, that while the recent amendments will alleviate some of the timing problems, an exchange 120 days prior to the trial date will allow the condemnor and condemnee to complete discovery and obtain rulings on valuation-related *in limine* motions which, in turn, will permit the parties to make better-reasoned final offers."

#### EARLY RESOLUTION OF LEGAL ISSUES

In Memorandum 2000-12, the staff examines existing provisions for early resolution of questions of law and suggests codification of a mechanism for a party to obtain early resolution of issues. Mr. Nave suggests that such a provision will have limited usefulness because there will be insufficient time after the parties learn about a disputed question of law to make an appropriate

motion. Mr. Nave points out, moreover, that many local court rules require in limine motions to be filed on or a few days before the trial date.

Mr. Nave suggests revision of the procedure proposed in Memorandum 2000-12 to further extend the time:

**Code Civ. Proc. § 1260.040 (added). Resolution of legal issues affecting valuation**

1260.040. If there is a dispute between plaintiff and defendant over a legal issue evidentiary or other legal issues affecting the determination of compensation, either party may, not later than 30 90 days before commencement of trial ~~on the issue of compensation~~, move the court for a ruling on the matter such issues. A motion under pursuant to this section shall be heard not sooner than 10 days and not later than 20 days after service of notice of the motion later than 70 days before commencement of trial, and the court shall issue its ruling on the motion not later than 10 days following the conclusion of said hearing.

**Comment.** Section 12160.040 is intended to provide a mechanism by which a party may obtain early resolution of a legal an in limine motion or other dispute affecting valuation. Nothing in this section precludes the use of other mechanisms procedures for the same purpose, including, without limitation, bifurcation of issues and control of the order of proof pursuant to statute and in limine hearings or other pretrial procedures procedure pursuant to court rule.

The proposed procedure is predicated on enactment of an earlier valuation data exchange date (120 days before trial).

**DISCLOSURE OF DETAILS OF DEPOSIT APPRAISAL**

Mr. Matteoni suggests that there be more adequate disclosure and review of the basis for the condemnor's prejudgment deposit. He envisions something along the following lines:

**Code Civ. Proc. § 1255.010 (amended). Deposit of probable compensation**

1255.010. (a) At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation, based on an appraisal, that will be awarded in the proceeding. The appraisal upon which the deposit is based shall be one that satisfies the requirements of subdivision (b). The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so.

(b) Before making a deposit under this section, the plaintiff shall have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property and (2) prepare a written statement of, or summary of the basis for, the appraisal. The statement or summary shall contain detail sufficient to indicate clearly the basis for the appraisal, including but not limited to all of the following information:

(1) If the appraisal is based on market data, the principal transactions supporting the appraisal.

(2) If the property acquired is part of a larger parcel, the calculations and a narrative explanation supporting the appraisal of any compensation for injury to the remainder.

**Comment.** Subdivision (b) of Section 1255.010 is amended to prescribe the contents of the written statement or summary of the basis for the deposit appraisal. The accuracy of such an appraisal is judicially reviewable pursuant to Section 1255.030 (increase or decrease in amount of deposit).

**Code Civ. Proc. § 1255.030 (amended). Increase or decrease in amount of deposit**

1255.030. (a) At any time after a deposit has been made pursuant to this article, the court shall, upon motion of the plaintiff or of any party having an interest in the property for which the deposit was made, determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding. In making a determination or redetermination, the court may consider the accuracy of the appraisal on which the deposit is based, as detailed in the written statement or summary of the basis for the appraisal referred to in Section 1255.010.

**Comment.** Subdivision (a) of Section 1255.030 is amended to recognize the role of the appraisal on which the deposit is based. A written statement or summary of the basis for the appraisal must be prepared pursuant to Section 1255.010.

The virtue of this sort of provision for our present purposes is that it may be a way of achieving early disclosure of valuation data, possibly enhancing settlement opportunities.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

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professional law corporation

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January 26, 2000

Nathaniel Sterling, Esq.  
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JAN 27 2000

File: \_\_\_\_\_

RE: Memorandum 2000-12  
Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain

Dear Mr. Sterling:

The purpose of this letter is to comment on Memorandum 2000-12, and, for the reasons discussed herein, to propose that Code of Civil Procedure Section 1258.220 be amended to make the exchange date 120 days prior to the trial date.

**The Timing and Consequences of the Final Offer Requires Earlier Disclosure of Valuation Data**

Until January 1, 2000, Code of Civil Procedure Section 1250.410 required that the condemnor and condemnee file and serve final offers of settlement 30 days prior to the trial date, and Code of Civil Procedure Section 1258.220 established the 40<sup>th</sup> day prior to trial as the date each party would exchange lists of expert witnesses and valuation data. As a result of 1999 amendments, the exchange date is now 60 days prior to trial and the final offer must be filed 20 days prior to trial.

Because of the unfortunate, but time-honored tradition of condemnation litigants to wait, for tactical reasons, until the last day to exchange experts and file final offers, prior to January 1, 2000, a condemnor theoretically had 10 days within which to (a) depose the experts identified in the exchange, (b) meet with the City Council, Board of Supervisors or Board of Directors to the condemnor to obtain settlement authority, and (c) make an *informed* settlement offer.<sup>1</sup>

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<sup>1</sup> If the court finds that the offer of the condemnor was unreasonable and the demand of the defendant was reasonable, viewed in the light of the evidence admitted and compensation awarded, the defendant shall be awarded litigation expenses, including attorney, appraiser and expert witness fees. See Code of Civil Procedure Sections 1250.410(b) and 1235.140.

It does not take clairvoyance to see that the 40 day exchange rule did not provide sufficient time for condemnor's counsel to analyze the deposition evidence and make a settlement recommendation to the governing board of the public agency. In the increasingly frequent cases where there were several experts on each side, it was not possible to complete the depositions in the 10 days before the final offer was due.<sup>2</sup> Add to this the fact that governing boards regularly meet bi-weekly, and a special meeting requires 24 hours advance public notice,<sup>3</sup> and it was clear that condemnors did not enjoy a level playing field.

Presumably, these problems motivated Caltrans to obtain legislation which added 20 days to the exchange date and subtracted 10 days from the settlement offer date. While I agree that it is too early to judge the effectiveness of the amendments to Sections 1258.220 and 1250.410, it is my opinion, based on three decades of eminent domain practice, that while the recent amendments will alleviate some of the timing problems, an exchange 120 days prior to the trial date will allow the condemnor and condemnnee to complete discovery and obtain rulings on valuation-related *in limine* motions which, in turn, will permit the parties to make better-reasoned final offers. For the reason that the reasonableness of the final offer in large part determines liability for litigation expenses,<sup>4</sup> it is obvious that the parties require a longer period between the dates of the exchange and the final offer.

While Norm Matteoni's observation the courts are reluctant to bifurcate or to hear *in limine* motions may be true, I believe the more serious problem to be the numerous Local Rules that require *in limine* motions to be filed several days prior to the trial date or on the first day of trial.<sup>5</sup> As discussed in Memorandum 2000-12, in eminent domain practice, most, if not all, *in limine* motions concern valuation issues. It goes without saying that an adverse ruling on an *in limine* motion may make a final offer almost irrelevant and certainly unreasonable.

For the reason that the majority of *in limine* motions are based on evidence which is disclosed in the exchange of valuation data or in the depositions that follow, if the final offers are to be reasonable, *in limine* motions should be determined sufficiently before the date of the final offers. Even the new 60 day

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<sup>2</sup> Unless opposing counsel were reasonable about setting the deposition dates for the experts, the notice requirements for depositions would not allow an expert to be deposed before the final offer was due. See Code of Civil Procedure Section 2025(b)(f) which provides that an oral deposition shall be scheduled for a date at least 10 days after service of the deposition notice.

<sup>3</sup> Government Code Section 54956.

<sup>4</sup> Code of Civil Procedure Sections 1250.410(b) and 1235.140.

<sup>5</sup> See attached January 26, 2000 memorandum.

exchange requirement does not permit sufficient time for this to occur.<sup>6</sup>

There is another consideration that dictates a longer interval between the exchange and trial dates: the growing Alternative Dispute Resolution (ADR) movement. It has been my experience as an eminent domain litigator and mediator that eminent domain lends itself well to mediation. However, to be effective, discovery and *in limine* motions should be completed before submitting the matter to mediation. A 120 day exchange requirement would provide sufficient time for meaningful mediation efforts.

To achieve the benefits of an earlier exchange date, not only would CCP §1258.220 have to again be amended to extend the exchange date from 60 days to 120 days, but a new statute is required to provide that the rulings on any *in limine* motions will occur sufficiently in advance of the date the final offer is filed. With some modification, proposed CCP §1260.040 can provide such a procedure as follows:

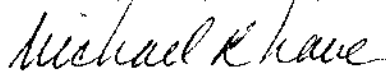
1260.040. If there is are disputes between plaintiff and defendant over evidentiary or other legal issues affecting the determination of compensation, either party may, not later than 90 days before commencement of trial, move the court for a ruling on such issues. A motion pursuant to this section shall be heard not later than 70 days before commencement of trial, and the court shall issue its ruling on the motion not later than 10 days following the conclusion of said hearing.

Comment. Section 1260.040 is intended to provide a mechanism by which a party may obtain early resolution of an *in limine* motion or other dispute affecting valuation. Nothing on this section precludes the use of other procedures for the same purpose, including, without limitation, bifurcation of issues and control of the order of proof pursuant to statute or other pretrial procedure pursuant to court rule.

I hope to be present on Friday, February 11, 2000 to address Memorandum 2000-12 and any related matters. Thank you for the opportunity to comment on this matter.

Very truly yours,

MEYERS, NAVE, RIBACK, SILVER & WILSON



Michael R. Nave

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<sup>6</sup> Proposed CCP §1260.040, discussed in Memorandum 2000-12, while laudable, will not work with the new 60 day exchange. Assuming the typical circumstances, the issues forming the basis for the *in limine* motions will not arise until the exchange or the depositions of the experts. By the time the *in limine* motions are filed, it is safe to assume that no more than 50 days remain before the trial date. Effective January 1, 2000, Code of Civil Procedure §1005 requires all moving and supporting papers must be filed and served at least 21 days before the hearing. If the hearing occurs no sooner than 21 days after the *in limine* motions are filed, the hearing will be only 9 days before final offer is filed (20 days before the trial date). Even in the unlikely event that a ruling on the motion is issued at the conclusion of the hearing, it would be virtually impossible for a condemnor's counsel to meet with the governing board and thereafter make a reasoned final offer.

## INTER-OFFICE MEMORANDUM

**DATE:** January 26, 2000

**TO:** Michael R. Nave

**FROM:** Susan Angelos

**RE:** Motions in Limine

Mike - you asked me to research various California counties to ascertain when motions in limine are due in that county. The following is what I found out:

County	Local Rule	When Due
Alameda	L.R. 4.8	Day of trial
Butte	L.R. 1.2	At Trial Readiness Conference, which is $\pm$ 14 days before trial
Contra Costa	L.R. 5	5 days before issue conference, which is $\pm$ 14 days before trial
El Dorado	L.R. 7	7 days before MSC, which is $\pm$ 21 days before trial
Fresno	L.R. 9	5 days before trial
Glenn	L.R. 5	7 days before trial
Humboldt	L.R. 4	Day before trial
Imperial	L.R. 2	15 days before trial or at trial management conference
Lassen	L.R. 2	Day of trial
Marin	L.R. 1.27	5 days before issue conference, which is $\pm$ 14 days before trial
Merced	L.R. 8	6 days before trial
San Francisco	L.R. 6.2	5 days before trial
Santa Clara	L.R. 1	Day of trial. Must list on settlement conference statement
Solano	L.R. 4	7 days before Trial Management Conference
Sonoma	L.R. 4.16	Day of trial